

COMMUNICATION MODELS IN LAW¹

by

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Communication processes can be generally described with the use of two models. The first one adopts cybernetic perspective, while the second one adopts social perspective. Cybernetic perspective leads to transmission conception of communication whereas the social one to convergent concept of it. Both communication models are deeply present in the legal discourses, i.e. in lawmaking discourse and discourse of application.

The issue related to the analysis of communication models in law is a part of a comprehensive area, which in the literature on the subject is related to the problem of ideology of lawmaking and law application. Dynamic nature of our social and legal reality can be described, on the one hand, by means of the conceptual network of communication models and, on the other hand, by means of many models of lawmaking and law application created by Jerzy Wróblewski and socio-historical model of lawmaking developed by Ewa Kustra based on the models of law set out in the conception of Phillippe Nonet and Phillip Selznick. The paper describes the position of the above-mentioned models in these discourses.

KEYWORDS

Modelling, discourse of lawmaking, discourse of law application, communication models

1. INTRODUCTION

The issue related to the analysis of communication models in law is a part of a comprehensive area, which in the literature on the subject is related to

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the problem of ideology of lawmaking and law implementation.² The insight into the existing legal systems from the point of view of broadly understood jurisprudence demonstrates that in many of its areas of research there is a change in the existing paradigms and a deconstruction of the conceptual framework of the existing legal institutions. We observe that the current legal systems are subject to far-reaching changes not only in the very procedures for implementing law, but also in the conceptual network, and therefore in the area of their theoretical models. The existing conceptual framework is no longer a sufficient instrument to provide a correct description of the transformations taking place in this area. These changes are a consequence of increasingly varied social processes in each of their layers. The advancement of knowledge entails technical progress, which in turn triggers off economic progress, which in consequence raises the complications of the division of labour and the consequent changes in the existing social structures and interpersonal relationships. The area of positive law in the scope of our interest, namely in the dimension of lawmaking and law application ceases to be perceived as a simple operation of the institutions, which on the one hand, arbitrarily make law – as the legislature – and, on the other hand, issue decisions in the form of an individual and particular character on the basis of general and abstract norms – as courts and public administrative bodies within the competences vested in them by legal norms. It turns out that the traditional types of modern legal systems are based only on outdated idealising assumptions aimed at constructing their own theoretical models that actually cease to conform to the description of reality. What becomes increasingly more apparent is the convergence of modern legal systems as exemplified – particularly in our legal reality – by a noticeable increase in the activism of those entities that could traditionally participate only in the discourse of law application but often go beyond the latter framework, thus being active in the legislative discourse. This phenomenon is undoubtedly caused by an increasing pace of social changes, their complexity and unpredictability, as a consequence of which the entities responsible for legislation do not keep up with the current dynamics of changes.

² The implementation of law is a broader concept than the one of law application as it encompasses not only the process of applying law but also any action undertaken by the actors on the basis of competence norm. More about the distinction of the concepts of law application, lawmaking, implementation and enforcement, see Leszczyński, L. 2004 *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa* [The Theory of Law Application. Doctrine and Case Law Theses], Zakamycze, Kraków, pp. 15-17.

What therefore undergoes changes is the traditional paradigm of the positivist model of lawmaking and law application, according to which the rules given by the legislature can be inferred and applied precisely and unambiguously. The phenomenon of a differentiation of the social sphere clearly shows that the legislator is not in a position to shape social reality through clearly defined and unchangeable rules. Unfortunately, such situation prejudices some crucial social values that constitute the foundation of a democratic rule of law. This leads to violations of the principle of citizens' trust in the state and in the statutory law whose value is manifested by the principle of legal certainty, legal security and the principle of legalism. The fact that lawmakers do not keep up with shaping the content of the positive law due to social changes and the need of their inclusion in legal provision causes that the complex nature of positive legal norms and their application sometimes becomes a "trap" for the citizens who are unable not only to correctly identify their own legal situation but also to predict the decisions of law application bodies.

The complicated nature of social relationships that are the subject of standardization also causes that the process of norm-making and, subsequently, its interpretation by the addressees of law is ultimately completed only in the discourse of law application. In fact, only the courts and public administrative bodies inform about the content of law, therefore the lawmaking process does not end within the legislative power, but it is transferred to the remaining powers, namely the executive and the judiciary. This phenomenon points to the fiction of the separation of powers and to its merely ideological significance. As a consequence, we can observe changes in the very ideology of lawmaking, at least at the level of the demands formulated in theory, sociology and philosophy of law. When looking from the perspective of the culture of continental law, it can be seen that the lawmaking process has been for centuries of decidedly imperious character, which is currently supplemented by a phenomenon of negotiations and agreement between the addressees of law and the legislator in the so-called social consultations.

The abovementioned phenomena (the complexity of social relationships, the fiction of the separation of powers and the increasing level of public awareness of the citizens), demonstrating a dynamic nature of our social and legal reality, can be described, on the one hand, by means of the conceptual network of communication models and, on the other hand, by

means of socio-historical model of lawmaking based on the model of law set out in the conception of Phillippe Nonet and Phillip Selznick³, in the lawmaking model developed by Ewa Kustra⁴ as well as in the model of lawmaking and law application created by Jerzy Wróblewski⁵.

2. COMMUNICATION MODELS

When analysing the concept of communication, one can generally distinguish two main trends, which may be referred to as cybernetic and social, depending on the research perspective of the issues of information management, its development, processing and reception⁶.

The former trend (cybernetic one) focuses its interest on communication processes in the framework of automatic control, monitoring, processing and retrieval of information. The latter (social one), on the other hand, has as its subject communication processes treated as a means of creating inter-subjective communicability between social actors and social systems. Another classification in the description of the phenomenon of communication takes into account the position of the sender and the recipient of information in the communication process, thus highlighting the transmission model and the convergence model of the communication process. The first model is linear and it is understood as stimulus-response sequence, or as sender-recipient sequence. The second model is of a cooperative or responsive character, where the sender can be simultaneously the recipient of the communication addressed previously to the recipient. In the first model, communication is strictly instrumental, i.e. communication is used to manage recipients as a form of a tool to transmit information. In the second model communication is a product of the relationship between the parties who mutually interpret the content of this relationship. The ultimate content of

³ Nonet Ph., Selznick Ph. 1978, *Law and Society in Transition: Toward Responsive Law*, Harper and Row, New York.

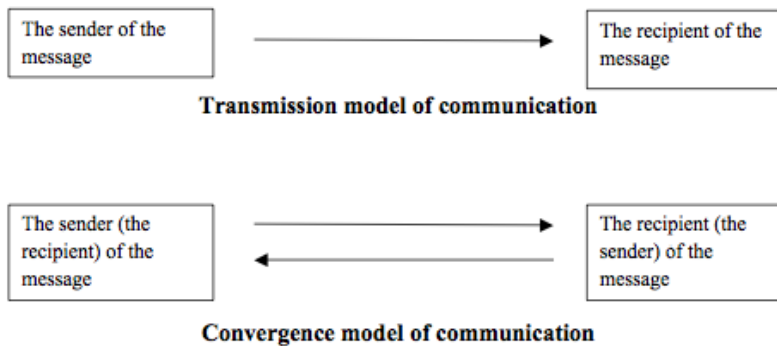
⁴ Kustra, E. 1994, *Polityczne problemy tworzenia prawa [Political Problems of Lawmaking]*, Wydawnictwo UMK, Toruń.

⁵ Wróblewski, J. 1989, *Zasady tworzenia prawa [Principles of Lawmaking]*, PWN, Warszawa; idem 1988, *Sądowe stosowanie prawa [Judicial Law Application]*, PWN, Warszawa.

⁶ Wiener, N. 1988, *Human use of Human Beings. Cybernetics and Society*, Da Capo Press, New York; McQuail, D., Windhal, S. 1993, *Communication Models*, Longman, New York; Petzel, J. 1999, *Informatyka prawnicza. Zagadnienia teorii i praktyki [Legal Informatics. Theory and Practice]*, Liber, Warszawa; Cyruł, W. 2012, *Wpływ procesów komunikacyjnych na praktykę tworzenia i stosowania prawa [The Influence of Communication Processes on the Practice of Lawmaking and Law Application]*, Wolters Kluwer, Warszawa.

the relationship thus depends on both recipient and the sender of the message.

The transmission model aims at achieving the effect of the sender's intended influence on the recipient's behaviour. In the convergent model, the sender's intended influence on the recipient's behaviour is correlated and agreed upon in mutual interaction – the sender and the recipient cooperate together, typically in order to reach an agreement.



If we look now at law as a social phenomenon from the perspective of the concept of discourse, i.e. from the point of view of the exchange of information aimed at developing intersubjectivity, the primary purpose of law is designing reality for a specific group of recipients, i.e. normative reality. To achieve this goal there must take place a situation involving communication. Modern legal systems distinguish between three such situations involving communication, which we may call the discourse of lawmaking, the discourse of compliance with law and the discourse of law application. The last two discourses can be jointly referred to as the discourse of law implementation⁷. In each of these discourses we can identify at least two levels of communication which correspond to the two abovementioned communication models.

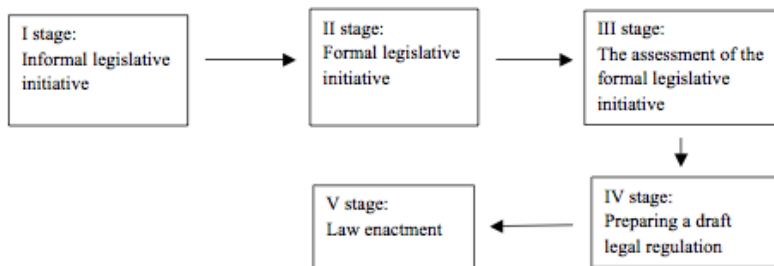
⁷ See: footnote 1.

3. MODELS OF LAWMAKING

3.1 DYNAMIC MODEL OF LAWMAKING BY JERZY WRÓBLEWSKI

In this model the discourse of lawmaking can be viewed, on the one hand, from the perspective of the form being a sequence of actions undertaken in accordance with the procedure and, on the other hand, as a clash of the interests represented within a given legislator. The first point of view suggests that within the dynamic model we can perceive the structure of a transmission model. In such case we take into account the concept of the rational legislator⁸.

J. Wróblewski's dynamic model of lawmaking process as a transmission model of communication⁹



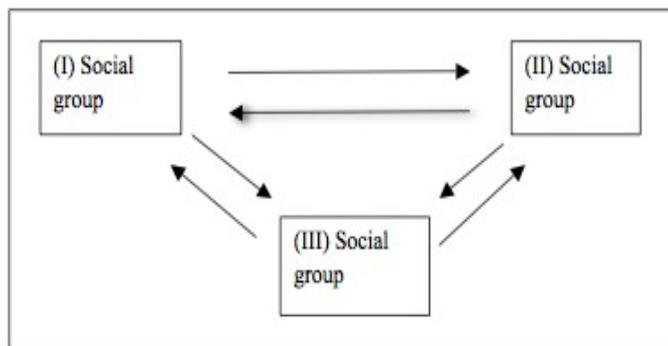
Transmission model of communication

If we look at the dynamic model of lawmaking from another perspective, namely from the point of view of perceiving lawmaking discourse as a result of a compromise reached in the framework of conflicting social interests represented in contemporary legislative (parliamentary) institutions by political parties or interest groups within the ruling party, we can clearly observe the structure of convergence model of communication. This model, in turn, implies the concept of a factual legislator.

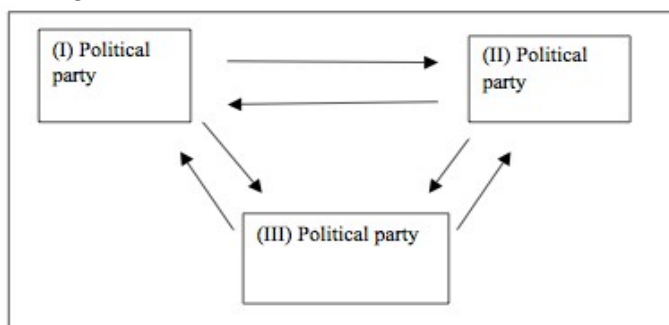
⁸ The concept of the rational legislator is treated as a conceptual structure of an idealising character that can be encountered in legal reasoning. The concept of the rational legislator is a bundle of characteristics that the legislator does not have and cannot have in reality (e.g., infallibility, perfect knowledge, perfect linguistic competence).

⁹ Wróblewski, J. 1989, *Zasady tworzenia prawa* [Principles of Lawmaking], PWN, Warszawa, pp. 124-134.

I stage: Informal legislative initiative



II stage: Formal legislative initiative



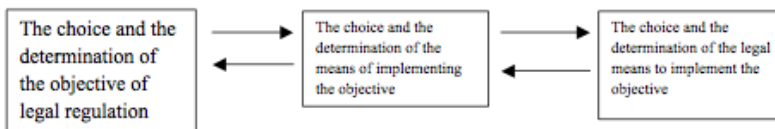
Convergent models of communication

3.2 MODEL OF RATIONAL LAWMAKING BY JERZY WRÓBLEWSKI

This model is based on the enumeration and analysis of the underlying problems that should be settled by the legislator if his actions are to be rational. From the point of view of communication models we deal here clearly with a convergent model. The choice of the objective is always determined by the possibilities of its implementation. On the one hand, these will be factual possibilities and, on the other hand, legal ones. It is often the case that the choice of the legal regulation is axiologically rather than merely praxeologically determined. Not every potential objective can be

achieved by any means, because it is not axiologically irrelevant. For example, the objective in the form of the substantive truth in criminal proceedings is not implemented strictly but by taking into account certain values, such as the protection of the bonds between relatives who may refuse to testify. Therefore, each stage of the rational model of lawmaking must be mutually analysed. The objectives determine the choice of the means of their implementation, and vice versa, the means determine the choice of the objectives.

J. Wróblewski's model of rational lawmaking¹⁰



Convergent model of communication

3.3 SOCIO-HISTORICAL MODEL OF LAWMAKING BY EWA KUSTRA (BASED ON PH. NONET AND PH. SELZNICK)

To assess lawmaking discourse in terms of the transmission and the convergent models we can also apply the classification proposed by Phillippe Nonet and Phillip Selznick, and developed by the Polish author, Ewa Kustra. The perspective of this division is to look at the content of law as a dynamic phenomenon from the point of view of implementing the idea of the rule of law and maximizing the principles of democracy, i.e. the involvement of the social factor in lawmaking process. What can be observed in this conception is the dynamic nature of the ideology of lawmaking process. From a historical point of view, both law and lawmaking process were based on the coercion and they were utterly subordinated to the objectives delineated only by the ruling elites (usually to maintain the status quo of the political order). This is the type of repressive law which corresponds to the voluntaristic (autocratic) type of its creation. What is characteristic for this type of lawmaking process is the transmission model of communication. The legislator only imperiously communicates (imposes) its will to the addressees of law, thus expecting responses that comply with his intentions. Normativity (the

¹⁰ Idem, pp. 49-65.

content of law) flows in a one-sided communication channel. The recipient's will – as a rule – is irrelevant for the content of law.

Repressive law – Voluntaristic (autocratic) type of lawmaking



Transmission model of communication

The second stage in the historical development of law is the model of autonomous law which began with the idea of *Rechtsstaat*, namely the rule of law. In this model, law is formally separated from politics. There are created rules that bind the authority. This is where autonomous legal rules control the operations of the authority, and not vice versa. There are created legal institutions that aim to embody the idea of the autonomy of law, such as the Constitutional Court, the administrative courts, ombudsman, etc. This stage of law corresponds to the legalistic type of its creation, in which the fundamental rules of the legal system impose the content of law both on the legislator and on the addressee. The content of law may not infringe certain rules which are defined as the root principles of the rule of law. These rules are partly explicitly expressed in the Constitutions of the respective legal systems and they arise from the legal culture of a given legal order. What is characteristic for this type of lawmaking process is the transmission model of communication. What differs, however, is the order of the elements in the transmission. The primary sender of the content of law is the very law itself conceived abstractly as an autonomous entity.

Autonomous law – Legalistic type of lawmaking

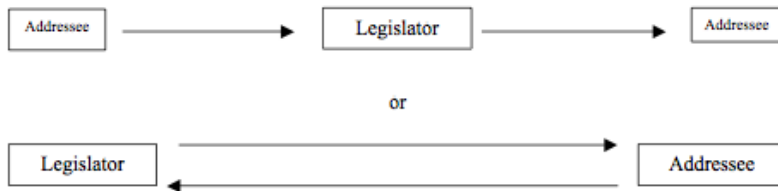


Transmission model of communication

The third stage in the historical development of law is the stage of responsive law, namely law that is sensitive to social transformations and needs. In this type of law even the fundamental rules of the legal system

must be modified in the scope of the emerging social needs. There arises the idea of self-regulation of social relations, namely decentralization of legislation. This stage of law corresponds to the social type of its creation. The recipient of law negotiates its content, while the legislative institutions are treated as the social partners rather than as the authority.

Responsive law – Social type of lawmaking



Convergent model of communication

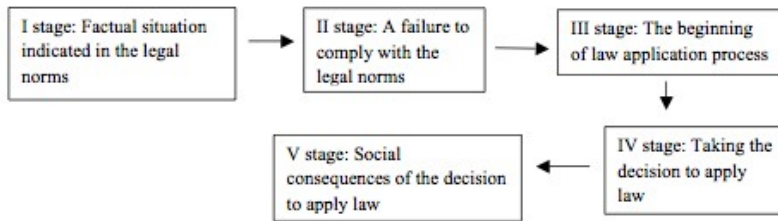
4. THE MODELS OF LAW APPLICATION BY JERZY WRÓBLEWSKI

Similarly like the lawmaking discourse analysis, the discourse of law application can be described by means of the transmission and the convergent models of communication. If we consider the actions undertaken by law applying bodies as sequential actions, then the transmission model of this discourse can be perceived both in the functional model of law application, in the decision-making model of law application and in the information model. In turn, if we focus on the creation of the content of the decision of law application, then what can be perceived in law application discourse is the convergent model of communication.

4.1 FUNCTIONAL MODEL OF LAW APPLICATION

Functional model of law application treats the process of law application as the element of social control and the means of conflict resolution in the community. The starting point for constructing this model is the failure to comply with the legal norms by the recipient of law and the reaction of law applying bodies to this fact.

J. Wróblewski's functional model of law application (the process of social control)¹¹

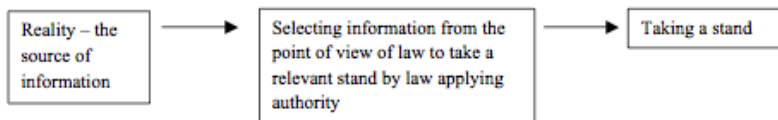


Transmission model of communication

4.2 INFORMATION MODEL OF LAW APPLICATION

Information model of law application perceives law as the process of information processing. The authority that applies law receives a range of information that must be selected from the point of view of law, and more precisely – from the perspective of the future decision on law application. Depending on the sources of information, this model can be very extensive. At this point the analysis is narrowed down only to the most basic approach.

J. Wróblewski's information model of law application (the process of processing specific information)¹²



Transmission model of communication

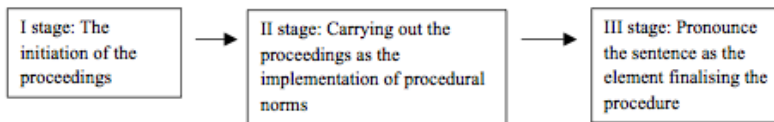
4.3 DECISION-MAKINGS MODEL OF LAW APPLICATION

Decision-making model of law application can take the form of a procedural and substantive model. In the first case, it takes into account the activities of law applying body as the application of procedural norms which determine the successive stages of proceedings.

¹¹ Wróblewski, J. 1988, *Sądowe stosowania prawa [Judicial Law Application]*, PWN, Warszawa, pp. 64-79.

¹² Idem, pp. 56-64.

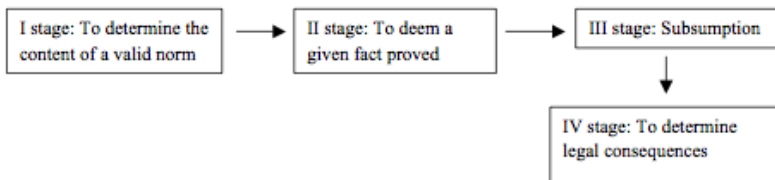
J. Wróblewski's decision-making as procedural model of law application¹³



Transmission model of communication

In the second case (substantive model) we take into account the elements that comprise the content of the decision of law application from the perspective of the implementation of the substantive norms.

J. Wróblewski's decision-making as substantive model of law application (decision-making process)¹⁴



Transmission model of communication

4.4 INFORMATION AND DECISION-MAKING MODEL OF LAW APPLICATION

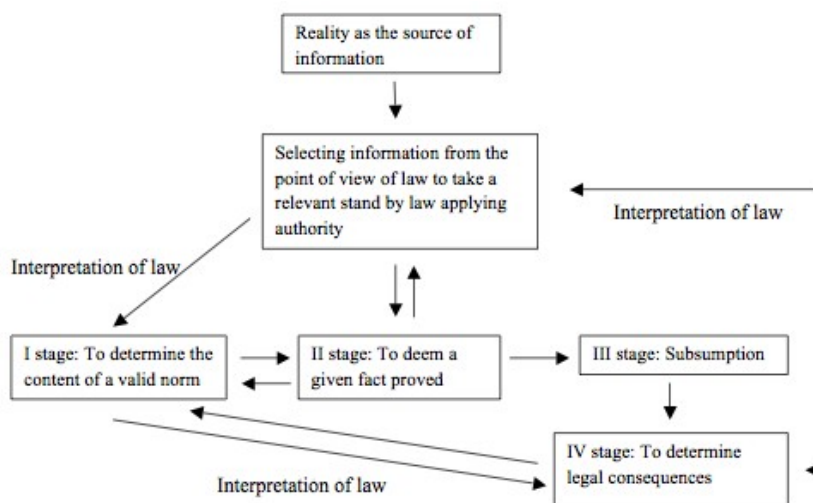
If the discourse of law takes into consideration the argumentative layer that forms the basis for issuing the decision of law application, what can be observed is the mutual influence and interpenetration of different contents which justify the fact of taking a given standpoint, not only in the final decision (in a judgment or in the administrative decision) but also in the so-called fragmentary decisions in the individual subsections (stages) of law application process, whether in the information model or decision-making model. From the substantive point of view (i.e. from the point of view of the content of fragmentary decisions and the final decision), each stage of the information model and the decision-making model is treated as the conver-

¹³ Idem, pp. 49-56.

¹⁴ Idem, pp. 42-49.

gent model. When looking at these models as a whole, the informative model and the decision-making model are mutually dependent. In particular, the convergent model of communication can be viewed from the perspective of the interpretation of law and mutual relationship between law and fact, namely the first and the second stage of decision-making model of law application. Where we deal with the determination of a valid norm for the needs of a given adjudication, the decision of law applying body will be always conditioned by the determination of the specific facts. Where the authority that applies law is expected to take a decision on the legal consequences, it will be determined by a number of factors which should be selected from reality for the needs of a given adjudication. The more information will be provided to the court or the public authority, the more accurate decision will be made as a choice of legal consequences.

J. Wróblewski's information-decision-making model of law application



Convergent model of communication

5. CONCLUSION

Modelling as a type of the methodology of a given science allows for a simplified, yet structured and synthetic description of the phenomena existing

in this science. Jurisprudence, like other sciences, uses this method to systematize often very complex relationships that can be encountered within its scope. Due to the extensive range of juridisation of social life, legal reality is very complicated and in order to be understood, it sometimes requires a simple theoretical approach offered by modelling. In jurisprudence modelling can describe the legal reality or postulate it. Thus, we deal either with descriptive or with normative models (*de lege ferenda*, *de sententiae ferenda*). All the models presented above are descriptive and highly idealising, because none of them can provide the entirety of the issues analysed in jurisprudence. Last but not least, what is extremely valuable for modelling is the possibility to understand the individual fragments of a wide area of legal reality.